# Abdul Rahman bin Jusoh v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–317 OF 2010
ABDUL MALIK ISHAK, KN SEGARA AND SYED AHMAD HELMY JJCA
29 MAY 2012

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*Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(c) — Offence of doing or offering to do an act preparatory to or for purpose of drug trafficking — Whether accused failed to rebut prosecution's evidence he personally negotiated sale of cannabis with policeman posing as buyer — Whether accused failed to raise reasonable doubt on prosecution's case*

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The appellant ('accused') was convicted and sentenced to death by the High Court for committing an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('DDA') which related to the doing of, or offering to do, an act preparatory to or for the purpose of drug trafficking. The accused was acquitted of an alternative charge under s 39B(1)(a) of the DDA for trafficking. According to the prosecution's evidence a police officer, SP4, was instructed by his superiors to pose as a potential purchaser for ganja which brought him into contact with a person named Man (accused) who was known to be supplying ganja in a particular area. SP4 said he met the accused personally to discuss the manner in which the 'purchase' of the drug could take place. It was agreed the accused would wait by the roadside at an appointed place and time with the drugs. SP4 went to meet the accused as arranged in a hired lorry. Sitting in the back of the lorry under the canvas cover were several policemen who were the ambush team. After arriving at the scene and after the accused showed SP4 the drugs which were kept in a plastic bag, the latter gave a pre-arranged signal to his colleagues who arrested the accused and recovered the drugs. The accused's defence was that he was an innocent victim of circumstances. He said he took a friend named Roslan on his motorcycle to the spot as the latter wanted to carry out a business transaction. The accused said while he was waiting on his motorcycle Roslan stood by the side of the road holding a plastic bag which he showed to SP4 when the latter arrived in a lorry. The accused said at that juncture several men suddenly emerged from the lorry and rushed at Roslan who threw the bag to the ground and ran in the direction of a nearby forest. The men gave chase but could not find Roslan. They then returned to where the accused was, retrieved the plastic bag and arrested the accused. The trial judge held the accused had created the character of Roslan to escape culpability; that the prosecution had proven there were prior negotiations/discussions between SP4 and the accused concerning the sale of the ganja, evidence of which the accused had failed to debunk. The judge had

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remarked that apart from bring up the issue of 'Roslan', the accused did not have any other defence to the charge and accordingly he had failed to raise any reasonable doubt on the prosecution's case. The accused appealed to the Court of Appeal against conviction and sentence.

**Held**, dismissing the appeal and affirming the conviction and sentence:

(1) There was no reason to disturb the trial judge's finding that Roslan was not involved in the transaction and was not present at all with the accused on the day of his arrest. The judge had not made any serious error in his finding of fact (see para 22).

(2) SP4 had no difficulty identifying the accused as he and Kpl Fauzi had met the accused face to face earlier when negotiating the transaction with SP4. Roslan was never involved in any negotiations with SP4 nor was he present at the meeting between SP4 and the accused (see para 23).

(3) There were no serious or material discrepancies and contradictions in the prosecution witnesses' evidence to affect their credibility, nor was there any break in the chain of evidence relating to the exhibits, namely, the drugs that were seized and the drugs that were examined by the chemist and produced in court. On the totality of the evidence the prosecution had proved its case beyond reasonable doubt and the conviction was safe (see paras 25–28).

**[Bahasa Malaysia summary**

Perayu ('tertuduh') disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana melakukan kesalahan di bawah s 39B(1)(c) Akta Dadah Berbahaya 1952 ('ADB') yang mana berkaitan perbuatan membuat, atau menawar untuk membuat, tindakan menyediakan atau bertujuan mengedar dadah. Tertuduh dilepaskan terhadap tuduhan alternatif di bawah s 39B(1)(a) ADB kerana mengedar. Mengikut keterangan pihak pendakwaan pegawai polis, SP4, diarahkan oleh ketua-ketuanya untuk berlagak sebagai pembeli berpotensi untuk ganja yang mana membawa dia berhubung dengan seorang yang bernama Man (tertuduh) yang diketahui membekalkan ganja di kawasan tertentu. SP4 menyatakan yang dia berjumpa tertuduh sendiri untuk membincangkan cara di mana 'purchase' dadah boleh mengambil tempat. Ia dipersetujui tertuduh akan tunggu di tepi jalan di tempat dan masa yang ditetapkan dengan dadah tersebut. SP4 pergi berjumpa tertuduh seperti yang diatur menaiki lori yang disewa. Duduk di belakang lori di bawah penutup kanvas beberapa anggota polis yang merupakan pasukan serang hendap. Selepas sampai di tempat kejadian dan selepas tertuduh menunjukkan kepada SP4 dadah tersebut yang mana disimpan di dalam beg plastik, SP4 memberi isyarat yang telah dirancang kepada rakan-rakannya yang menangkap tertuduh dan memperolehi dadah tersebut. Pembelaan tertuduh adalah dia adalah mangsa yang tidak bersalah akibat keadaan. Dia menyatakan dia membawa

kawan yang bernama Roslan menaiki motosikalnya ke tempat seperti yang SP4 mengkehendaki untuk menjalankan transaksi perniagaan tersebut. Tertuduh menyatakan semasa dia menunggu di atas motosikal, Roslan berdiri di tepi jalan memegang beg plastik yang dia tunjuk kepada SP4 apabila dia tiba dengan lori. Tertuduh menyatakan pada masa tersebut beberapa orang lelaki tiba-tiba muncul daripada lori dan berlari ke arah Roslan yang membaling beg tersebut ke atas tanah dan berlari ke arah hutan yang berdekatan. Anggota polis mengejar tetapi tidak dapat mencari Roslan. Mereka kemudiannya kembali di mana tertuduh berada, mengambil beg plastik dan menahan dan menangkap tertuduh. Hakim perbicaraan memutuskan tertuduh telah mereka watak Roslan untuk melarikan diri dari kebersalahan; bahawa pendakwaan telah membuktikan terdapat perundingan/perbincangan sebelumnya di antara SP4 dan tertuduh berkaitan jualan ganja, keterangan yang mana tertuduh gagal untuk mempaparkan. Hakim telah mengatakan selain daripada membawa isu 'Roslan', tertuduh tidak mempunyai pembelaan lain terhadap tuduhan tersebut dan oleh itu dia gagal untuk membangkitkan apa-apa keraguan munasabah ke atas kes pihak pendakwaan. Tertuduh merayu kepada Mahkamah Rayuan terhadap sabitan dan hukuman.

**Diputuskan**, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tidak terdapat sebab untuk campur tangan dapatan hakim perbicaraan bahawa Roslan tidak terlibat dalam transaksi dan langsung tidak ada bersama tertuduh pada hari dia ditangkap. Hakim tidak membuat apa-apa kesilapan yang serius dalam dapatan faktanya (lihat perenggan 22).

(2) SP4 tidak mempunyai masalah mengenalpasti tertuduh memandangkan dia dan Kpl Fauzi telah berjumpa dan bersemuka dengan tertuduh sebelumnya apabila berunding mengenai transaksi dengan SP4. Roslan tidak terlibat dalam mana-mana perundingan dengan SP4 dia juga tidak ada semasa di antara SP4 dan tertuduh (lihat perenggan 23).

(3) Tidak terdapat percanggahan material dan penyangkalan yang serius dalam keterangan saksi-saksi untuk menjejaskan kredibiliti mereka, malah tidak terdapat apa-apa yang terputus dalam rantaian keterangan berkaitan ekshibit-ekshibit, terutamanya, dadah yang dirampas dan dadah yang diperiksa oleh ahli kimia dan dikemukakan di mahkamah. Atas keseluruhan keterangan pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan sabitan adalah selamat (lihat perenggan 25–28).]

**Notes**

For cases on s 39B(1)(c) of the Dangerous Drugs Act 1952, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 721–722.

**Legislation referred to**

Dangerous Drugs Act 1952 ss 39B(1), (a), (c), (2)

**Appeal from:** Criminal Trial No 45–05 of 2007 (High Court, Alor Setar)

*JM Martin (JM Martin & Associates) for the appellant.*
*Lailawati bt Ali (Attornye General's Chambers of Malaysia) for the respondent.*

**KN Segara JCA (delivering judgment of the court):**

**[1]** The appellant ('the accused') was charged for an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952 and in the alternative for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. Both the offences are punishable under s 39B(2) of the said Act upon conviction with death.

**[2]** At the High Court, Alor Setar, the accused was called upon to enter his defence to the principal charge and acquitted on the alternative charge under s 39B(1)(a) for trafficking. At the end of the trial, after the accused had entered his defence and given his evidence on oath, without calling any other witnesses, he was found guilty, convicted and sentenced to death for an offence under s 39B(1)(c).

Section 39B(1)(c) reads:

> 39B. Trafficking in dangerous drugs
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> (1) No person shall, on his own behalf or on behalf of any other person, whether or not such person is in Malaysia —
>
> (a) …
>
> (b) …
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.

**[3]** We dismissed the appeal and affirmed the conviction and sentence of the trial court.

**[4]** The case for the prosecution is based primarily on the evidence of two police officers, namely, Abdul Razak bin Awang Mustafa ('SP4') and Hassan bin Mohamad Salih ('SP5').

**[5]** SP5 had instructed SP4 to act on the information received that ganja is being supplied by a man known as 'Man' in Labu Besar area. SP5 was part of the team of police officers who effected the arrest of the accused.

**[6]** SP4, together with another police officer, Mohd Fauzi bin Yaakob, acted as agent provocateur in discussing and dealing with the accused for the purchase of the drug cannabis. Mohd Fauzi bin Yaakob was not called as a witness to testify for the prosecution. He was offered as a witness to the defence, at the close of the prosecution's case.

**[7]** Briefly, the case for the prosecution is as follows:

**[8]** On 2 July 2006, SP4 received information about a male Malay, known as 'Man', supplying ganja (cannabis) in the Labu Besar area, Kulim. He informed his superior officer, that is, SP5, who then instructed SP4 to act as an agent provocateur together with Lans Koporal Fauzi bin Yaakob ('Kpl Fauzi').

**[9]** SP4, having already obtained the telephone number of 'Man' from his source, made contact with 'Man' over the phone at about 7.45pm, on the same day (2 July 2006), with a view to discuss and negotiate a sale and purchase of the drug. SP4 introduced himself as a potential ganja purchaser. Arising from that telephone conversation 'Man' agreed to supply to SP4 ganja, at a price of RM2,500 per kilogram. SP4 requested a period of one to two weeks to come up with the fund.

**[10]** On 9 July 2006, at about 10.30pm, SP4, together with Kpl Fauzi, met 'Man', that is, the accused, at a playground. SP5 had instructed SP4 to discuss the manner of the delivery of the drug. SP4 and Kpl Fauzi went there in a lorry. This was the first face to face meeting between SP4 and the accused. Kpl Fauzi was present throughout the discussion. Agreement was reached that the drug would be delivered upon the sum of RM2,500 received by the accused. SP4 requested the accused to contact him if there was any development in respect of the deal.

**[11]** On 13 July 2006, the accused contacted SP4 and informed him that the drug was now available and in his possession. He inquired when SP4 could take delivery. SP4 informed the accused that he was unable to take delivery yet because of his work commitments. The accused contacted SP4 again on 15 July 2006, at about 10.45am, and SP4 replied that he was out of the area. The accused made a similar call to SP4 on 20 July 2006, and subsequently, made inquiries by SMS on 22 July 2006 and 25 July 2006. SP4 responded to the SMS on 25 July 2006 by indicating that he would be able to take delivery of the drug on the next day (26 July 2006). He informed SP5 and the Ketua Jabatan Siasatan Jenayah Daerah Kulim, accordingly. SP5 decided to carry out an operation to follow up with this latest development.

**[12]** At about 3pm, on 25 July 2006, SP4 telephoned the accused and

informed him that he would agree to take delivery of the drug on that day (25 July 2006). The accused fixed the meeting place for the delivery to be at Taman Desa Aman, at about 7pm.

**[13]** At about 5pm, on 25 July 2006, SP5 held a briefing for a team of seven police personnel who were to participate in the operation to arrest the accused. At the briefing, it was agreed that SP4 would utter the words, 'Lan, ambil duit', when SP4 was certain that the 'target' (the accused) had with him the drug. This was the agreed signal for the police party involved in the operation to effect arrest of the accused.

**[14]** The police party proceeded in a hired lorry towards Taman Desa Aman and arrived there at about 8pm. The back of the lorry was covered with canvas (that is, the roof and the sides of the lorry). The back portion could be opened from inside. Kpl Fauzi was the driver. SP4 was seated in front, beside the driver. SP5 and the other members of the police party were at the back of the lorry.

**[15]** When they arrived at Taman Desa Aman, the accused was not there as promised. SP4 then received a call from the accused to inform him of a change in the place of delivery. SP4 informed SP5, accordingly, by phone. SP5 then directed SP4 to proceed to the new venue where the accused was waiting. SP5 testified:

> Semasa berada di Taman Desa Aman LKpl Razak terima panggilan telefon dari Man beritahu dia akan tunggu di tepi jalan Titi Karangan, Sungai Karangan menghala ke Baling. Dia akan tunggu di sana untuk buat penyerahan. Kpl Razak maklumkan perkara ini kepada saya melalui telefon. Selepas mendapat maklumat tersebut saya arahkan Kpl Razak menuju ke tempat sasaran bertemu. Sebelum bertolak saya berpesan kepada Kpl Razak supaya dia pastikan terlebih dahulu sasaran dan juga jumpa barang, iaitu dadah jenis ganja di mana apabila dia sudah pasti dia akan panggil LKpl Fauzi dengan kata panggilan 'Lan bawa duit'. Itu adalah kod untuk saya pastikan barang dan mulakan serbuan

**[16]** When they arrived at the new venue, SP4 saw the accused beside the road on a motorcycle. Kpl Fauzi stopped the lorry near the motorcycle, about 3 feet from it. SP3 got down from the lorry and met the accused. He asked him where the drug is. The accused then held a plastic package, opened it and, showed it to SP4. SP4 saw a compressed lump wrapped inside the plastic package. At that time, Kpl Fauzi was still at the wheel of the lorry and the lights of the lorry were still switched on. SP4 then called out loudly to Kpl Fauzi, 'Lan bawa duit'. Kpl Fauzi immediately alighted from the lorry and, at about the same time, SP5 and the other members of the police party alighted from the back of the lorry. SP5 identified himself as police. A struggle ensued between SP5 and the accused. The accused was eventually arrested. SP5 testified:

Saya bertolak dari Taman Desa Aman dengan lori yang dipandu oleh LKpl Fauzi menghala ke jalan Titi Karangan, Sungai Karangan ke Baling. Setelah melepasi lampu isyarat Labu Besar, LKpl Razak beritahu saya sekali lagi Man ada tunggu di tepi jalan dan Fauzi akan berhentikan lori di tempat yang Man tunggu. Selepas itu saya dapati memang ada seorang lelaki berada di tepi jalan bersama dengan motosikal. Saya dapati ini melalui ruang pandang belakang. Saya boleh nampak sebab ada lampu kenderaan. Saya sendiri nampak melalui cermin lutsinar. Waktu itu lori sudah berhenti berhampiran motosikal sasaran — lebih kurang jarak 3 kaki atau 2 1/2 kaki — lebih kurang. Lampu lori terpasang. Kedudukan lori tepi jalan menghala ke Baling. Motosikal diletak melintang menghala ke Baling Selepas itu LKpl Razak turun dari lori menuju ke arah sasaran. Saya nampak mereka berbual. Sasaran ada memegang satu plastik. LKpl Razak kemudian memanggil 'Lan bawa duit' — dengan kuat Kami bersedia untuk turun bersama LKpl Fauzi. Saya bersama anggota terus menghala ke sasaran, di mana LKpl Razak dan Fauzi telah berada dengan berhampiran sasaran. Saya terlebih dahulu perkenalkan diri saya sebagai polis. Semasa itu berlaku pergelutan antara saya dengan sasaran, seorang lelaki melayu. Saya berjaya tahan lelaki melayu tersebut.

**[17]** SP5 examined the plastic package held by the accused. Inside the package was a clear plastic filled with a compact lump of plant material wrapped in aluminum foil. SP5 also carried out a body search of the accused. SP5 found, inter alia, in the pocket of the accused's jeans, three clear plastic with three lumps of compacted dry leaves, suspected to be cannabis. SP5 testified:

Saya buat pemeriksaan ke atas plastik yang saya lihat dia pegang.

Masa tangkapan bungkusan plastik masih ada ditangan sasaran.

Beg berwama hitam. Beg plastik ada bertulis Hong Leong Fashion Trading di atas plastik. Di dalamnya terdapat satu plastik lutsinar berisi satu ketulan mampat yang dibalut dengan kertas timah. Terdapat ketulan mampat daun kering saya syaki dadah jenis ganja. Seterusnya saya buat pemeriksaan lanjut ke atas tubuh badan tertuduh. Di dalam poket sebelah kanan hadapan seluar yang di pakai saya jumpa tiga plastik lutsinar — di dalam nya berisi 3 ketulan mampat daun kering disyaki dadah ganja. Tertuduh pakai seluar jeans …

**[18]** The compacted plant material, in the plastic package as well as that in the three plastic found in the pocket of the jeans were seized by SP5. They were analysed by the chemist, SP2, and were found to be cannabis, weighing 946g.

**[19]** The defence of the accused was essentially that he was not involved in this transaction with SP4 at all. And that he was a victim of circumstances, when a friend of his known as Roslan or Lan had carried out a business transaction with SP4, on the date in question and managed to escape when confronted by the police by throwing a package at the scene, leaving the accused seated on the motorcycle, to bear the brunt of an accusation by the

police that the package retrieved by the police, in fact belongs to the accused. In short, the charge was a frame — up against him by the police.

**[20]** Briefly, the accused's defence on oath was as follows.

**[21]** On 27 July 2006 (25 July 2006), at about 7.30pm, a person known as Lan came to see him at his house. His full name is Roslan. He requested the accused to follow him to Taman Desa Aman, Kulim, as he wanted to carry out a business transaction there. The accused was asked by Lan to take him there on accused's motorcycle. When they arrived at Taman Desa Aman, Lan got off the motorcycle and made a telephone call. After that Lan requested the accused to proceed to Titi Karangan.

**[22]** When they arrived at Titi Karangan, Lan got off the motorcycle and waited by the side of the road, holding a plastic bag. The accused remained seated on his motorcycle. About two or three minutes later a lorry came along-side Lan. A person came down from the lorry and Lan showed him the plastic package in his hand. The accused then heard a voice call out 'Lan bawa barang'. The person standing in front of Lan had called out 'Lan bawa barang'. Suddenly, several persons came out from the back of the lorry. Lan pushed the person who had talked to him and ran in the direction of the forest. Lan threw the plastic bag on to the grass. Several persons chased after Lan. At that time, the accused was seated on his motorcycle and did not run away. Two to three minutes later, the persons who had chased after Lan came back and retrieved the plastic bag lying on the ground. They approached the accused and asked where Lan had run. The accused testified that when he replied that he did not know, they alleged that the plastic bag belonged to him. He was then arrested.

**[23]** We are satisfied that the trial judge had carefully considered and evaluated the defence. The defence had merely raised the issue of the involvement and presence of one Lan. He did not believe the evidence about Lan or the presence of Lan at the time of the incident, that is, on the date and time for the collection of the drug, when the accused was arrested by SP5. SP4 had no difficulty identifying the accused, as he and Kpl Fauzi had met the accused face to face earlier when negotiating the transaction with SP4. Lan was never involved in any negotiation with SP4 nor was he present at the face to face meeting between SP4 and the accused.

**[24]** We are of the view that the trial judge has not made any serious error in his finding of fact. We have carefully perused through the record of proceedings and the notes of evidence recorded in the High Court. We have no reason to disturb the judge's finding that Lan was not involved in the transaction or was not present at all with the accused on the day of the accused's arrest.

**[25]** There were no serious or material discrepancies and contradictions in the prosecution's witness's evidence to affect their credibility. In the absence of any obvious misdirection or failure to appreciate and evaluate the evidence in its total context with reference to the charge, by the trial judge, an appellate court should not interfere with the trial judge's findings on the credibility of witnesses.

**[26]** We are satisfied that there is no break in the chain of evidence relating to the exhibits, namely, the drugs that were seized and the drugs that were examined by the chemist and produced in court. An obvious error in the recording of the identification mark of the sealed box of exhibits by the store keeper, when he received the box for safe custody, has in no way prejudiced the accused or created any doubts as to whether the exhibits produced in court are the very same exhibits seized from the accused.

**[27]** We are in complete agreement with the trial judge's finding in para [31] of his grounds of judgment which reads as follows:

> Berasaskan pertimbangan ke atas keseluruhan keterangan dan keadaan di dalam kes ini saya dapati kewujuduan Lan atau Roslan ini amat diragukan malahan saya dapati sebenarnya Lan atau Roslan ini tidak wujud dan hanya ditimbulkan oleh tertuduh untuk melepaskan diri dari pertuduhan ini. Di dalam keadaan pembelaan tertuduh semata-mata bergantung kepada wujudnya Lan dan Lan ini sebenamya tidak wujud maka pembelaan tertuduh sama sekali tidak dapat menimbulkan apa-apa keraguan terhadap kes pendakwa yang telah membuktikan adanya perbincangan dan perundingan di antara SP4 dan tertuduh yang menunjukkan tertuduh telah bersetuju menjual dadah kepada SP4. Saya dapati pihak pendakwa membuktikan pada masa ditangkap tertuduh telah melakukan suatu perbuatan bagi tujuan mengedar dadah berbahaya iaitu cannabis seberat 946g kepada SP4, satu kesalahan dibawah s 39B(1)(c) Akta Dadah Berbahaya 1952. Tertuduh didapati salah dan disabitkan dengan kesalahan tersebut

**[28]** We are unanimous in our view, that on the totality of the evidence the prosecution has proved its case beyond a reasonable doubt. We are also unanimous in our view that the conviction of the accused is safe.

**[29]** Appeal dismissed. Conviction and sentence of the High Court affirmed.

*Appeal dismissed and conviction and sentence affirmed.*

Reported by Ashok Kumar